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# Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-718

EAST TEXAS MOTOR FREIGHT SYSTEM, INC.,
*Petitioner,*

v.

JESSE RODRIGUEZ, MODESTO HERRERA,
and SADRACH PEREZ,
*Respondents.*

## BRIEF OF PETITIONER EAST TEXAS MOTOR FREIGHT SYSTEM, INC., TO THE SUPREME COURT OF THE UNITED STATES

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## BRIEF OF PETITIONER EAST TEXAS MOTOR FREIGHT SYSTEM, INC., TO THE SUPREME COURT OF THE UNITED STATES

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### OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, dated November 25, 1974, is reported at 505 F.2d 40 and is reprinted in the Appendix hereto at page 68. The notice of the order on petition for rehearing is dated August 18, 1975, and appears in the Appendix hereto at page 112. The decision for the United States District Court for the Western District

of Texas, dated March 22, 1973, is reported at 6 CCH E.P.D. ¶ 8815 and is reprinted in the Appendix hereto at page 55.

## JURISDICTION

Plaintiffs brought this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 and 42 U.S.C. § 1981 seeking relief for themselves and members of a class. The District Court found that the cause of action was inappropriate for a class action and that none of the Defendants had violated Title VII or Section 1981.

The judgment of the Court of Appeals reversing the District Court's decision was entered on November 25, 1974. Petitioner's timely Petition for Rehearing was denied on August 18, 1975. *Certiorari* was granted on May 24, 1976. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Whether, absent a class action hearing or an equivalent opportunity to present evidence on the question of the appropriateness of the class, the Court of Appeals may certify the litigation as a class action and enter a finding of liability in favor of the Plaintiff class.

2. Whether the Court of Appeals, consistent with due process, may ignore a pre-trial stipulation, and *sua sponte* make a finding of liability without affording the Defendant an opportunity to present evidence to the District Court.

3. Whether the Court of Appeals properly relied on undifferentiated statistical evidence in entering a finding of liability in favor of the Plaintiff class.



## STATUTORY PROVISIONS INVOLVED

Section 703(a) of Title VII of the Civil Rights Act of 1964, (as amended) 42 U.S.C. § 2000e-2:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Civil Rights Act of 1870, 42 U.S.C. § 1981:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Rule 23 of the Federal Rules of Civil Procedure:

> (a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or

defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect.to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.



(c) *Determination by Order Whether Class Action to be Maintained; . . .*

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits. . . .

## STATEMENT OF FACTS

East Texas Motor Freight (ETMF) is an interstate common carrier of general freight by motor truck. During the time period relevant to this litigation ETMF operated 52 terminals in 19 states (App. 162).[1] This litigation concerns ETMF operations in the State of Texas where ETMF had 21 terminals. ETMF locates most of its freight terminals in or near major cities served by ETMF. At these terminals, a shipper's freight is accumulated for dispatch to distant cities in the ETMF system and freight from other terminals is delivered for ultimate delivery to consignees in the metropolitan area served by that facility. ETMF employs two basic classifications of truck drivers; city drivers and over-the-road drivers. City drivers handle the pickup and delivery of freight within the metropolitan area served by the terminal at which they are employed. Over-the-road drivers transport freight long distances between ETMF ter-

[1] References to pages in the Joint Appendix hereto will be referred to as "App. —".

minals. City drivers are employed at virtually all terminals. Over-the-road drivers are normally employed or domiciled only at certain terminals, the location of which is a management decision based in large part on the volume of outbound freight generated at that terminal and the geographic location of the terminal in relation to other ETMF terminals (App. 170). For example, in the State of Texas during the relevant period, ETMF had 6 terminals that domiciled road drivers and 15 terminals that did not. On the other hand, ETMF had city drivers at virtually all terminals (App. 171).

Each terminal in the company's system is an independent profit center. Thus, each terminal maintains primary responsibility for hiring its own personnel. Although the corporate office in Dallas approves each applicant for employment, terminal management makes the affirmative decision to hire and assumes responsibility for that decision (App. 186-187). In order to preserve the profit-center concept of internal accountability, ETMF has a general policy prohibiting transfer between terminals[2] (App. 187-188). The rationale for this policy is that to allow employees to transfer from terminal to terminal would visit one manager's hiring mistake on the manager of another terminal. Furthermore, to allow a manager in one city to hire for employment at a terminal in another city dilutes hiring responsibility and the profit-center concept of internal accountability (App. 188).

ETMF's qualification for road drivers which had been at issue in this litigation were more stringent

[2] The company is required by its collective bargaining agreement to allow transfer in certain limited circumstances, such as in the event of layoff.



than for city drivers. Road drivers must be at least 27 years old and have three years of "immediate prior line-haul road experience." City drivers, on the other hand, must be at least 21 years old and have at least one year pickup and delivery experience (App. 178). City drivers and road drivers are covered by different supplemental agreements to the National Master Freight Agreement, an industry collective bargaining agreement (App. 331, 342). ETMF has a "no-transfer" policy prohibiting the transfer of drivers between the city and road driver classifications.[3] The stringent road driver qualifications and the "no-transfer" between job classifications policy were motivated by safety considerations. During the 1950's, ETMF's poor safety record had caused the ICC Department of Transportation to suspend ETMF's authority to haul certain classes of government freight and also to withhold additional route authority sought by ETMF. (App. 164, 179). These events led the employer to implement the stricter set of qualifications for road driver personnel referred to, *supra* (App. 176-178). In order to maintain these high standards, the no-transfer rule between classifications was imposed. (App. 167).

The named Plaintiffs applied and were employed at ETMF's San Antonio terminal between 1959 and 1965. (App. 56, ¶ 3). The San Antonio terminal employs only city drivers (App. 173). ETMF has never actively employed road drivers at that location. The

[3] For 30 days in January and February of 1972, to ease morale problems among its city drivers, ETMF relaxed its "no-transfer" policy at selected road domiciles and permitted city drivers to transfer to the road driver classification, providing they could meet the road driver qualifications (App. 188).

named Plaintiffs' claim turns on written inquiries for employment as road drivers submitted to the San Antonio terminal manager in August, 1970. At that time, ETMF was hiring no new road drivers because of its contractual obligation to recall drivers on layoff status before hiring persons from outside the classification. When the company resumed hiring into the road driver classification in March, 1971, Plaintiffs were not considered as applicants because of the company's no transfer policies and because they had expressed their interest in the jobs at the San Antonio terminal which was not a road domicile. (App. 191).

Furthermore, none of the Plaintiff-Respondents satisfied the company's over-the-road driver requirements. Jesse Rodriguez had no road driver experience and, at the time of his inquiry concerning road jobs, had been involved in three on-the-job accidents (App. 60, Finding 20). At the time of their inquiries, Messrs. Herrera and Perez had no prior road driving experience. Additionally, Mr. Herrera had been involved in on-the-job accidents. (App. 61, Findings 21, 22).

The three named Plaintiffs filed written charges with the Equal Employment Opportunity Commission, complaining that the policies of ETMF, Local 657 of the Teamsters Union, and the Southern Conference of Teamsters discriminated against Blacks and Mexican-Americans. After receipt of their "right to sue" letters in October, 1971, Plaintiffs filed an action alleging discrimination against themselves and members of the class described as follows:

> That the appropriate class should consist of all Defendant East Texas Motor Freight's Mexican-American and Black city drivers included in the collective bargaining agreement entered into between East Texas Motor Freight and the Southern Conference of Teamsters covering the State of Texas. Additionally, that such class should properly be composed of all Mexican-American and Black applicants for line drivers positions with East Texas Motor Freight included in the above by the Southern Conference of Teamsters from July 2, 1975, to present. (App. 15, ¶ 12).



Despite this initial characterization of the case as a class action, the parties stipulated that the only issue at trial would be ETMF's liability to the individual Plaintiffs. (App. 113; 115, ¶ 8). Following trial, the United States District Court held that the claims of the individual Plaintiffs were without merit and that the litigation was not properly maintained as a class action. (App. 55, 66). On appeal, the Court of Appeals reversed the decision of the District Court and held that the case was appropriate as a class action. (App. 68, 83). The Appellate Court held that the appropriate class was that which Plaintiffs had styled:

> All of East Texas Motor Freight's Mexican-American and Black city drivers included in the collective bargaining agreement entered into between East Texas Motor Freight and the Southern Conference of Teamsters covering the State of Texas.[4] (App. 83).

The Court of Appeals made this finding notwithstanding that the Plaintiffs had offered no proof concerning the appropriateness of a Plaintiff class. The Court

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[4] The Court of Appeals affirmed the District Court's dismissal of the class claims of Black and Mexican-American applicants for employment as road drivers at ETMF's Texas terminals because no proof had been offered concerning liability to that class. (App. 83).

affirmed the District Court's dismissal of the cause as to "all Mexican-American and Black applicants for line driver positions" which Plaintiffs alleged to represent. The Court of Appeals held, further, that ETMF was liable to members of the Plaintiff class and that the named Plaintiffs were entitled to recovery by virtue of their being members of the class. (App. 97).

## SUMMARY OF THE ARGUMENT

The decision by the Court of Appeals violates Rule 23 of the Federal Rules of Civil Procedure and disrupts the orderly and fair development of judicial procedures in lawsuits brought under Title VII of the Civil Rights Act of 1964. The Court of Appeals ignored the manner in which the parties and the District Court had tried the lawsuit and substituted its precedential preconceptions for what actually happened between the advocates during the proceedings. The appellate court acted precipitously on the basis of impressions it had formed in other appellate proceedings involving different facts and different parties.

The Court of Appeals improperly reversed the District Court's dismissal of the Plaintiffs' class action claims. The Plaintiffs, by electing not to seek a class determination, failed to prosecute effectively the litigation as a class action, and further, entered into a binding stipulation at the commencement of trial that the only issue before the District Court was the claims of the individual Plaintiffs. On the basis of these factors and the Plaintiffs' presentation of their case, the District Court concluded that the class claims should be dismissed rather than decided. The Court of Appeals overrode the District Court's exercise of its discretion under Rule 23 and erroneously held that the



Plaintiffs were not required to move the District Court to have their claims certified as a class action, thus improperly allocating that burden to the District Court. The orderly judicial administration of class actions requires that the burden of crystallizing the class action question rests with the Plaintiffs, not with the District Court or the Defendants. The Court of Appeals compounded its mistake by *sua sponte* certifying the litigation as a class action and overstepped the boundaries of the appellate process by superimposing a class action form on a trial conducted as an individual action.

The defects in the substantive approach adopted by the Court of Appeals in reviewing the merits of the Plaintiff's Title VII claims are as serious and far-reaching as the procedural errors committed by the Court of Appeals. The Appellate Court erred in holding that a Plaintiff class can establish a *prima facie* case of employment discrimination without presenting any evidence that the Defendant employer discriminated against the members of Plaintiff class. The Court of Appeals, disregarding the binding stipulation entered into by the parties that the Plaintiffs were employed at the San Antonio terminal of East Texas Motor Freight without regard to their race, color or national origin, inferred that Defendant's employment practices were discriminatory from mere general employment statistics. Such statistics are not sufficient to shift the burden to the employer to establish that it did not discriminate against the Plaintiff class without further proof establishing that the Plaintiff class is included within the resulting evidentiary inference. The affirmative burden of establishing that the members of the Plaintiff class were victims of dis-

crimination must rest with the Plaintiffs. To do otherwise is to reverse the adversary process and to allocate to the Defendant the burden of disproving the Plaintiff's unsupported allegation of discrimination.

By relying on general employment statistics as the sole component of a *prima facie* case, the Court of Appeals ignored the relevant-labor-market concept which is a critical factor in establishing a nexus between the alleged discrimination and the claims of the plaintiff class. If, as here, members of the plaintiff class were not present in the geographical area, or if there is no showing that ETMF hired others when qualified members of the class were seeking employment, then a statistical imbalance raises no inference that the employer had unlawfully discriminated against the persons in the plaintiff class.

The alleged racial and ethnic imbalance of the ETMF's road driver workforce is presently the subject of intensive remedial hiring procedures pursuant to the terms of a partial consent decree agreed to by the United States and East Texas Motor Freight in an independent court proceeding under Title VII. However, the mere existence of this imbalance alone is insufficient to establish liability to the class certified by the Court of Appeals in this case.

The decision of the District Court that the individual claims of the named Plaintiffs lacked merit is well supported both legally and factually and, like the District Court's dismissal of the class claims, should be reinstated by the Court. However, even if the District Court erred and the Plaintiffs did not abandon the class claims, the Court of Appeals should have remanded the class action question to the District Court



to determine initially whether the litigation was an appropriate class action; to define the scope of the class; and to establish an evidentiary record with respect to the Plaintiffs class' claims of liability. The Court of Appeals, relying on dissimilar precedent and its own preconceived notions of socio-demographic principles, succumbed to the pitfalls that are created when an appellate court oversteps its proper function and assumes, without the benefit of an adversary proceeding, the role of a trial court.

## ARGUMENT

### I. THE COURT OF APPEALS DISREGARDED THE PROCEDURES OF RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND IMPROPERLY CERTIFIED THE PLAINTIFF CLASS AB INITIO.

#### A. The Court of Appeals' Appellate Certification of the Litigation as a Class Action Was Improper Because Rule 23 of the Federal Rules of Civil Procedure Requires that a Class Action Determination Be Made by the District Court Prior to a Decision on the Merits.

The procedural profile of the litigation at the time it was submitted to the Court of Appeals is relevant in understanding the error in that court's treatment of the class action question. The Plaintiffs, notwithstanding the class action allegations in the complaint, did not request a class determination by the District Court pursuant to Rule 23(c) of the Federal Rules of Civil Procedure. ETMF, in its answer as well as in the pretrial pleadings, took the position that a class action was inappropriate. (App. 32 ¶ 2, 34 ¶ 4). Immediately prior to the trial the parties entered into a restrictive stipulation which provided that "the only issue presently before the Court pertaining to the Company is whether the failure of the defendant, East Texas Motor

Freight, to consider plaintiffs' line driver applications constituted a violation of Title VII and 42 U.S.C. Section 1981." (App. 113; 115 ¶ 8). At the trial itself only one colloquy between the Court and counsel touched on the class action question but did not result in a determination as to the nature of the litigation. (App. 128-130). In fact, prior to the District Court's decision on the merits, the class action question was not the subject of argument by counsel, the submission of facts or consideration by the trial court.

In its decision on the merits, the District Court concluded that the case was not a proper one for class action, and, thus, dismissed the class claims. (App. 66 ¶ 2). This conclusion was based on a finding that the Plaintiffs had not moved for an order pursuant to Rule 23(c)(1) and had not presented any proof as to liability and damages to the class. (App. 65, ¶¶ 31, 32). On appeal, the Plaintiffs conceded that the District Court had not tried the case as a class action and they urged that the Court of Appeals remand the case to allow the District Court to make the determination pursuant to Rule 23(c)(1). (Appellants' Initial Brief to the Court of Appeals at 48).

Despite this procedural history, the Court of Appeals decided, *sua sponte*, that the case was appropriate as a class action and that the class was "all East Texas Motor Freight Mexican-American and Black city drivers included in the collective bargaining agreement entered into between East Texas Motor Freight and Southern Conference of Teamsters covering the State of Texas." (App. 83). This class was substantially the same as the class which the Plaintiffs alleged to represent in their complaint. (App. 15 ¶ 12).



The Fifth Circuit's decision on the class action issue is materially inconsistent with the language and the intent of Rule 23 of the Federal Rules of Civil Procedure. The District Court did not abuse its discretion when it concluded that the Plaintiffs' cause of action "is not a proper one for a class action" (App. 66 ¶ 2) because the Plaintiffs "confined the evidence, arguments and post trial brief to the individual claims of the named plaintiffs." (App. 61 ¶ 32). The District Court's dismissal of the class action claims was an appropriate response to the procedural posture adopted by the Plaintiffs. Alternatively, if the Court should agree with the Court of Appeals and conclude that the trial court erred in dismissing the class claims, it is ETMF's position that the appellate court acted incorrectly when it certified the litigation as a class action and made an affirmative finding of liability on behalf of the plaintiff class.[5]

The Court of Appeals was apparently motivated to adjudicate the litigation as a class action by its assumption that it had been tried as such in the District Court. (App. 81). As support for this supposition, the Court of Appeals looked to the inconclusive colloquy

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[5] The Plaintiffs had also alleged to represent a class of Mexican-American and Black applicants for road driver positions at ETMF's Texas terminals. The Court of Appeals declined to include these persons in the class because "the Plaintiffs never pursued the action on behalf of these individuals." (App. 83). It is ETMF's contention that the Plaintiffs similarly abandoned all other class-related claims, thus, the Fifth Circuit should have affirmed the holding of the District Court that the case was not appropriate for a class action. It is ETMF's position that the decision of the Court of Appeals should be affirmed insofar as it sustained the earlier judgment of the District Court with respect to the Plaintiffs' applicant class.

between counsel and the Court, and certain road driver and city driver employment statistics. In concluding that "the Plaintiffs continued to proceed as a class action" (App. 82), the Court of Appeals ignored the parties' pretrial stipulation, the overall body of evidence submitted to the District Court, and the Plaintiffs' candid admission in their brief to the Court of Appeals that "[t]he class action has never been considered by the lower court and, therefore, its dismissal must be overturned." (Appellants Initial Brief to the Court of Appeals, p. 48).

Because the District Court's dismissal of the class action was premised on a finding that the Plaintiff had neither moved for an order nor presented proof and thereby had abandoned the class, the trial court did not have the occasion to receive evidence or hear argument by the parties directed to the class action question. Therefore, the record does not contain the basis upon which a decision on either the appropriateness of a class action or the liability to a class may be made. For that reason, it was improper for the Court of Appeals to assume the role of a trial judge and to make an initial class action determination on the basis of a trial record which had been developed by both parties as an individual rather than a class action. The Court of Appeals decision short-circuited the procedures mandated by Rule 23 and deprived the defendant of its right to submit evidence and make legal arguments with respect to the class determination as well as the question of the Defendant's liability to the putative class.

The proper procedural vehicle for qualifying the litigation as a class action was available to the Plaintiffs within Rule 23. Their failure to move for an order certifying the case as a class action raises a



strong inference that they elected to proceed individually. *See Yulio* v. *Moore McCormick Lines, Inc.,* 387 F.Supp. 872 (S.D.N.Y. 1975).

The Plaintiffs in a class action bear the burden of proving that their case meets the requirements of Rule 23(a) and (b). *Rossin* v. *Southern Union Gas Co.,* 472 F.2d 707, 712 (10th Cir. 1973). Thus, in *Glodgett* v. *Betit*, 368 F.Supp. 211 (D. Vt. 1973), *aff'd sub nom. Philbrook* v. *Glodgett*, 421 U.S. 707 (1975), the three-judge District Court, before ruling on cross motions for summary judgment, dismissed the class aspects of the case, stating:

> An action is not maintainable as a class action merely because it is so designated in the pleadings. *Cash* v. *Swifton Land Corporation*, 434 F. 2d 569, 571 (6th Cir. 1970); *In re Swan-Finch Oil Corporation,* 279 F.Supp. 386, 391 (S.D.N.Y. 1967). To the contrary, the plaintiffs in a purported class action bear the burden of establishing that their action meets the prerequisities of Rule 23. *Rossin* v. *Southern Union Gas Company* 472 F.2d 707, 712 (10th Cir. 1973); *Poindexter* v. *Teubert,* 462 F.2d 1096, 1097 (4th Cir. 1972); *Daye* v. *Commonwealth of Pennsylvania,* 344 F.Supp. 1337, 1342 (E.D. Pa. 1972); *Clark* v. *Thompson,* 206 F.Supp. 539, 542 (S. D. Miss. 1962), *aff'd* 313 F.2d 637 (5th Cir. 1963), *cert. denied,* 375 U.S. 951; 84 S.Ct. 440, 11 L.Ed.2d 312 (1963); *Free World Foreign Cars, Inc.,* v. *Alfa Romeo,* 55 F.R.D. 26, 29 (S.D.N.Y. 1972); *see Demarco* v. *Edens,* 390 F.2d 836, 845 (2d Cir. 1968); *Phillips* v. *Sherman,* 197 F.Supp. 866, 869 (N.D.N.Y. 1961). This burden imposes upon the plaintiffs in a purported class action responsibility to move for a formal certification of their class action by the court under Rule 23(c)(1). *Herbst* v. *Able,* 45 F.R.D. 451, 453 (S.D.N.Y.

1968); *Zeigler* v. *Gibraltar Life Insurance Company* 43 F.R.D. 169, 170 (D. S.D. 1967).

* * *

In moving for summary judgment without having sought a formal certification of this action as a class action, *the plaintiffs leave us no choice but to dismiss the class aspects of this suit on the ground that the plaintiffs have failed to meet their burden to prove that the action meets the prerequisites of Rule 23. Id.* at 214 (emphasis added).

In this case as well, the Plaintiffs presented no evidence concerning the applicability of Rule 23 beyond merely alleging the existence of the class in their pleadings and making reference to discrimination against "Mexican-Americans and Blacks" in their proposed pretrial order. Plaintiffs' counsel has not attempted to carry their burden under Rule 23, and the District Court in its findings Nos. 31 and 32 clearly states this. (App. 66)

The Court of Appeals held that the class representatives have no obligation to move for a class action determination and that "that responsibility falls to the [District] Court." (App. 78). This interpretation of Rule 23 by the Court of Appeals must be rejected because it frustrates the intent of the 1966 amendments to Rule 23 and because it does violence to the well developed principal of jurisprudence that the Plaintiff bears responsibility for proving the allegations in his complaint.

By exempting the Plaintiffs from the obligation to seek class certification prior to trial, the Court of Appeals revived the abuse of "one-way intervention" which the 1966 amendments to Rule 23 sought to eliminate. In *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), the Court stated:



> Under Rule 23 as it stood prior to its extensive amendment in 1966, 383 U.S. 1047-1050, a so-called "spurious" class action could be maintained when "the character of the right sought to be enforced for or against the class is . . . several, and there is a common question of law or fact affecting the several rights and a common relief is sought." The Rule, however, contains no mechanism for determining at any point in advance of final judgment which of those potential members of the class claimed in the complaint were actual members and would be bound by the judgment. Rather, "[w]hen a suit was brought by or against such a class, it was merely an invitation to joinder—an invitation to become a fellow traveler in the litigaton, whch might or might not be accepted." 3B J. Moore, Federal Practice § 23.10[1], p. 23-2603 (2d ed.). *Cf. Snyder* v. *Harris*, 394 U.S. 332, 335; *Zahn* v. *International Paper Co., ante* at 296, n. 6. A recurrent source of abuse under the former Rule lay in the potential that members of the claimed class could in some situations await developments in the trial or even final judgment on the merits in order to determine whether participation would be favorable to their interest. If the evidence at trial made their prospective position as an actual class member appear weak, or if determination precluded the possibility of a favorable determination, such putative members of the class that chose not to intervene or join as parties would not be bound by the judgment. This situation—the potential for so-called 'one-way intervention'—aroused considerable criticism upon the ground that it was unfair to allow members of a class to benefit from a favorable judgment without subjecting themselves *to the binding effect of an unfavorable one.* The 1966 amendments were de-

> signed, in part, specifically to mend this perceived defect in the former Rule and to assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments. *Id.* at 545-47. (footnotes omitted, emphasis added).

*See also Eisen* v. *Carlisle & Jacqueline,* 417 U.S. 156, 176-77 (1974); *Peritz* v. *Liberty Loan Co.,* 523 F.2d 349 (7th Cir. 1975).

These considerations are clearly applicable to class actions brought under Title VII. As then Judge Stevens noted in his dissent in *Sprogis* v. *United Airlines, Inc.*, 444 F.2d 1194 (7th Cir. 1971):

> At a minimum, this rule requires the class to be defined before the merits of the case have been decided. This requirement is, of course, of special importance in litigation involving claims for damages or backpay. A procedure which permits a claim to be treated as a class action if plaintiff wins, but merely as an individual claim if plaintiff loses, is strikingly unfair. *Id.* at 1207 (footnote omitted).

In its effect, the action in this case by the Court of Appeals is indistinguishable from the "one-way intervention" which the amended Rule 23 was designed to prevent. The Defendant, having lost on the merits in the eyes of the Fifth Circuit Court of Appeals, is liable to the class. However, it is simply inconceivable that the Court of Appeals, had it found Defendant's practices to be nondiscriminatory, would have taken similar steps to bind all members of the alleged class to that determination. The trial court, in dismissing the class action, did not bind the members of the purported class on the merits and, under its decision, unnamed class



members alleging a cause of action might subsequently bring individual or class action against the Defendants.

The burden for obtaining an early adjudication of the "class action" allegations cannot be left in limbo. Among the Plaintiffs, the Defendant, and the Court, the obligation is most fairly ascribed to the Plaintiffs because they initiated the class action and agreed to represent absent individuals in the litigation. The character of a particular cause of action is determined from the outset by the Plaintiffs. The allegations in the complaint inform the Defendant and the trial court whether the Plaintiffs are seeking to proceed individually or in a representative capacity. By voluntarily undertaking a representative status, the Plaintiffs assume the responsibilities of proceeding in a manner consistent with Rule 23. One of those obligations is to secure judicial ratification of that status from the District Court "by order". The Court of Appeals' decision, insofar as it holds that the Plaintiffs are under no obligation to seek certification, effectively forces the Defendant to seek a judicial determination of the class or face the peril of a subsequent court determination that he is liable for injunctive relief and back pay to some undetermined and undefined Plaintiff class. Conversely, the Plaintiff, who assumed class representative status with the concomitant duty to represent the class, is free to do nothing, secure in the knowledge that this inaction will result in no prejudice to his claim.[6]

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[6] In this litigation, evidence was introduced by the Defendant conclusively establishing that the three named Plaintiffs were unqualified as road drivers and the District Court so found. The Plaintiffs made no effort to seek class certification. As a result of this inaction, the Court of Appeals certified the case as a

To assign the obligation to initiate certification proceedings to the District Court is inappropriate because the Court functions in an adversary context and ought not be required to initiate the submission of a question that it will then be required to decide. Finally, it would be unfair to require the Defendant to move for a certification determination because it did not voluntarily offer to defend the class action claim; that status was thrust upon it by the Plaintiffs' complaint. The District Court judge was acting within his discretion in dismissing the class action aspects of this case and that determination should not be disturbed unless the party challenging it can show an abuse of discretion. *Clark* v. *Watchie,* 513 F.2d 994, 1000 (9th Cir. 1975); *Bermudas* v. *U. S. Department of Agriculture,* 490 F.2d 718 725 (D.C. Cir. 1973), *cert. denied sub nom. Butts* v. *Bermudas,* 414 U.S. 1104 (1974); *Wilcox* v. *Commerce Bank of Kansas City,* 474 F.2d 336, 344 (10th Cir. 1973); *Castro* v. *Beecher,* 459 F.2d 725, 732 (1st Cir. 1972); *Hackett* v. *General Host Corp.,* 455 F.2d 618, 626 (3d Cir. 1972); *Gold Strike Stamp Co.* v. *Christensen,* 436 F.2d 791, 792-93 (10th Cir. 1970); *City of New York* v. *International Pipe & Ceramics Corp.,* 410 F.2d 295, 298 (2d Cir. 1969).

Rule 23(c)(1) of the Federal Rules of Civil Procedure provides as follows:

> As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained An order under this subdivision may be conditional and may be altered or amended before the decision on the merits.

This directive is not addressed to the Court of Appeals but to the federal District Court. The language of the Rule, allowing as it does alteration and amendment before the decision on the merits, clearly contemplates conditional certification well before the decision on the merits and impliedly prohibits certification thereafter. It is important that the District Court make an early certification decision because the Court's ruling defines the scope of the litigation and the issues with respect to which the parties must prepare and present evidence. If the Court of Appeals is permitted to inform the parties for the first time after the close of the record that they were litigating a class action, both the plaintiffs and the defendants will be deprived of an effective opportunity to participate in the litigation in a meaningful way. The Manual for Complex Litigation § 1.40 (2d ed. 1975) contains the following discussion:

> The mandatory language of Rule 23(c)(1) is based upon sound and urgent practical considerations. If the determination whether the action should proceed as a class action is delayed, serious injustices may result, and avoidable procedural difficulties of great magnitude may ensue. For example, persons having notice of the class action request, thinking themselves represented in the proposed class action, may, in reliance on the requested class action, fail to make a claim for relief until the statute of limitations has run. If the class action request is belatedly denied, these persons may have lost their right to sue to protect their individual interests. If discovery proceeds in

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class action and accordingly vacated as "premature" the District Court's finding that the Plaintiffs were individually not qualified. Thus, the Plaintiffs' inaction not only did not prejudice them but served as a vehicle for obtaining appellate resuscitation of their individual claims.

the action while a class action request remains undetermined, and the court later determines that the action may be so maintained, the discovery may be unusable because of the absence of parties and absence of representation of the members of the class. *Id.* at § 1.40.

The Manual recommends that the class action determination be made no later than the second pretrial conference.[7] *Id.* at § 2.10. This approach is consistent with the Federal Rules of Civil Procedure which are designed to "narrow and clarify" the basic issues and to provide the parties and, therefore, the District Court with facts relative to those issues. In *Hickman* v. *Taylor,* 329 U.S. 495 (1947) the Court said of the rules:

> Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial. *Id.* at 501 (footnote omitted).

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[7] Indeed the necessity for early determination of the class claims is so important that the following federal district courts have promulgated rules providing specific time limits within which a party must move for class certification: District of Columbia, Rule 1-13 (90 days after suit commenced); Southern District of New York, Civil Rule 11A(c) (60 days); Southern District of Ohio, Rule 3.9.3 (90 days); Eastern District of Louisiana, Rule 2.12(c) (90 days); Eastern District of Pennsylvania, Rule 45(c) (90 days); Middle District of Pennsylvania, Rule 701.07(c) (90 days); Western District of Pennsylvania, Rule 34(c) (60 days); Rhode Island, Rule 30(c) (60 days); Vermont, Rule 11(3) (90 days); Western District of Washington, CR 23(3) (90 days); Southern District of Florida, Rule 19A.3 (90 days); Northern District of Georgia, Rule 221.13 (90 days); Southern District of Indiana, Rule 7(b) (90 days).

*See* Frankel, *Some Preliminary Observations Concerning Civil Rule 23,* 43 F.R.D. 39, 41.



Consistent with this principle, the parties in this case stipulated at the beginning of trial that there was but one issue to be determined:

> That the only issue presently before the Court pertaining to the company is whether the failure of the Defendant, East Texas Motor Freight, to consider Plaintiffs' line driver applications constituted a violation of Title VII and 42 U.S.C. § 1981. (App. 113; 115 ¶ 8)

The pretrial stipulation molded the order and nature of the evidence adduced by the Defendant Petitioners (and presumably by the Respondents)[8] in the ensuing trial. As a consequence, the Defendants concentrated their defense on the lack of qualifications of the three named Plaintiffs under Defendant ETMF's standards, stipulated as nondiscriminatory, on the reasonable assumption that a Plaintiff in a Title VII action must prove that he was qualified for the job which was denied him for allegedly discriminatory reasons. *Cf. McDonnell Douglas* v. *Green,* 411 U.S. 792, 802 (1973).

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[8] Clearly, the Plaintiffs-Respondents also believed that the trial was directed solely to the liability of Defendants to the individual Plaintiffs and, thus, stated in their brief to the Court of Appeals that:

> The position of the Plaintiffs with respect to dismissal of the class action is that the dismissal was erroneous since it had been agreed that the singular issue for trial related only to the company's failure to consider the road applications. Appellant's Initial Brief, 46.

In light of that stipulation, they argued:

> The class action has never been considered by the lower court and, therefore, its dismissal must be overturned. *Id.* at 48.

Thus, they requested that the cause be reversed and remanded to the District Court "for consideration of the class action allegations." *Id.*

In making the class action determination during the appellate stage of the litigation, the Court of Appeals apparently followed its earlier decision in *Bing* v. *Roadway Express, Inc.*, 485 F.2d 441 (5th Cir. 1973) where the Court of Appeals approved a class action award entered without a Rule 23(c)(1) determination. In *Bing* the record supported the finding that the parties and trial court had assumed that the litigation was a class action. Notwithstanding this unanimity with respect to the scope of action, the *Bing* decision has been the object of critical scholarly commentary:

> The decision should not be read too broadly, however, since in that case the court took note of the fact that the complaint alleged discrimination against the class, class relief was sought, no objection was made to the class nature of the action and class relief was given. The better general rule is that the court cannot simply award class relief after adjudicating an individual claim. Wright & Miller, *Federal Practice and Procedure*, § 1754 (Supp. 1976) (footnote omitted).

Other courts of appeals have heeded Professor Wright's warning. Therefore, in *Jackson* v. *Lynn*, 506 F.2d 233 (D.C. Cir. 1974), the Court of Appeals for the District of Columbia said:

> The record contains neither a certificate or any showing that the district court agreed to hear this case as a class action, nor any judicial pronouncement to define the scope of the class. Rule 23(c)(1), F.R.Civ.P., provides for a determination by order of the district court whether an action brought as a class action may be so maintained. Courts have treated an affirmative order under that Rule as a prerequisite to class action maintenance whether or not the defendant challenges



> the class action allegation. *E.g., Dorfmann* v. *Boozer*, 1969, 134 U.S.App.D.C. 272, 414 F.2d 1168, 1171, n. 8; *Davis* v. *Romney*, 490 F.2d 1360 (3d Cir. 1974). Thus, this court may not consider this appeal as a class action, and may reach issues only to the extent that the named plaintiffs are affected. *Id.* at 236.

*Accord, Case & Co., Inc.* v. *Board of Trade of City of Chicago*, 523 F.2d 355, 360 (7th Cir. 1975).

In *Indianapolis School Commissioners* v. *Jacobs*, 420 U.S. 128 (1975) (*per curiam*), the Court ordered the case vacated as moot when the named Plaintiffs graduated from high school because it had never been formally certified as a class action under Rule 23(c)(1) and, thus, there was no present case or controversy. *Id.* at 130. The Court so held over the vigorous dissent of Justice Douglas who said:

> [T]he absence of such a written order is too slender a reed to support a holding of mootness, particularly in the face of the uncontrovertible evidence that certification was intended and did, in fact, take place. *Id.* at 131.

The Court regarded the existence of a written order by the District Court judge prior to a decision on the merits as an absolute prerequisite to the maintenance of a class action brought under Subdivisions b(1) and b(2) of Rule 23 in *Baxter* v. *Palmigiano*, — U.S. —, 44 U.S.L.W. 4487 (U.S. Apr. 20, 1976). The Court said:

> The District Court treated this suit as a class action but did not certify the action as a class action within the contemplation of Rules 23(c)(1) and 23(c)(3), Federal Rules of Civil Procedure. Without such certification and identification of the

class, the action is not properly a class action. *Indianapolis School Comm'rs.* v. *Jacobs,* 420 U.S. 128 (1975). *Id.* at 4488, n. 1 (citation omitted).

The absence of such an order in this case deprived the Court of Appeals of the jurisdiction to consider the question of liability to the class. The imposition of liability to members of the purported class on a record directed to the issue of individual liability without affording the Defendant the opportunity to present evidence or legal argument in its defense, constitutes a violation of "the immutable principle of natural justice, that no man's right should be prejudiced by the judgment or decree of a court, without opportunity of defending the right." *Hollingsworth* v. *Barbour,* 4 Peters 466, 475 (1830).

On the basis of these considerations, ETMF respectfully urges the Court to find that the District Court did not abuse its discretion when it concluded that the Plaintiffs had abandoned their class action claims, both as to applicants for line driver positions and as to city drivers, by failing to move for an order and by not offering proof on the class claims. As the Court has recently reaffirmed, the federal courts must follow the requirements of Rule 23 even though adherence may in effect deny the Plaintiff the opportunity to pursue his claim. *Eisen* v. *Carlisle & Jacqueline, supra.* The named Plaintiffs have had an opportunity to litigate their claims, and reinstatement of the District Court's dismissal of the entire class action is proper. In the alternative, if the Court should conclude that the District Court abused its discretion in finding that the Plaintiffs abandoned their claim and made no showing as to the class, the Court should affirm the Court of Appeals' finding of abandonment of the class action



as to applicants and remand this matter to the District Court for a class determination as to city drivers and retrial thereof. At the very least, the Plaintiffs' inaction and the pretrial stipulation (on which Defendants and the District Court properly relied) resulted in manifest confusion with respect to the status of the litigation. For this reason, it was patently unfair for the Court of Appeals to conclude that the parties litigated this case as a class action when both parties have averred to the contrary, and the Court of Appeals, by its own characterization, conceded that "the Plaintiffs concentrated at trial on the individual claims of the named Plaintiffs." (App. 82). Even if the Court of Appeals properly invested the District Court with the ultimate responsibility to make a class action determination, there is no reason to penalize the Defendants for the District Court's breach of that duty by precluding them from introducing evidence and submitting argument on the class action question and the issue of liability to the plaintiff class.

**B. The Court of Appeals Erroneously Exempted the Plaintiffs from the Requirements of Rule 23 of the Federal Rules of Civil Procedure.**

In determining that this case was an appropriate class action, the Court of Appeals made no factual inquiry to determine whether the litigation met the prerequisites of Rule 23(a), but merely concluded:

> There is no serious dispute that the Plaintiffs here have satisfied the three criteria in Rule 23(a). The class clearly meets the requirements that the members be so numerous that joinder would be impractical, that there are common questions of law and fact, and that the claims and defenses of the representative parties are typical (App. 79).

The Court of Appeals statement that there is no dispute about the Plaintiffs' compliance with the criteria of Rule 23(a) is simply erroneous. ETMF in its answer and pretrial statement challenged the appropriateness of the Plaintiffs' class allegations (App. 32 ¶ 2, 34 ¶ 2). A formal dispute on the record of this litigation did not crystallize because the Plaintiffs elected not to move for class certification and stipulated that the only issue before the Court at trial involved their individual claims.[9] However, ETMF's challenge to the class allegation remained undecided and was improperly ignored by the Court of Appeals when it determined that there was no serious dispute about the appropriateness of the plaintiff class. The appellate court's comment about there being "no serious dispute" (App. 79), like its later statement that the litigation was "completed as a class action" (App. 81) is nothing more than camouflage for the fact that it was making a determination that should have been the subject of proceedings in the District Court. Under these circumstances the Court of Appeals decision to decide the class issues *sua sponte* was tantamount to waiving a factual analysis of the Rule 23(a) criteria.

The court rationalized this novel procedure by superimposing a legal premise that "suits brought under [Title VII and 42 USC § 1981] are inherently class suits". (App. 78). However, nothing in Rule 23, in Title VII nor in Section 1981 supports such an interpretation. The Advisory Committee's Note to the 1966 amendments to Rule 23 comments that the Committee considered Rule 23(b)(2) to be especially appropriate in civil rights cases. But, nothing in the text of Rule

[9] The binding effect of this stipulation is treated in point III *infra*.



23(b)(2) or in the Advisory Committee's Notes indicates that Rule 23(b)(2) class actions should be exempt from the strictures of Rule 23(a). On the contrary, the plain language of Rule 23 requires that *all* class actions meet all of the prerequisities of Rule 23(a); only then will the trial court determine whether the case falls within one of the three subdivisions of Rule 23(b). See *Taylor* v. *Safeway Stores, Inc.*, 524 F.2d 263 (10th Cir. 1975). Title VII of the Civil Rights Act was passed prior to the revision of the Federal Rules of Civil Procedure which are here in issue. Had the drafters of Rule 23 intended that Title VII cases be exempt from the requirements of Rule 23(a), they could have done so. They did not. Rather, the text of Rule 23(b) plainly states:

> *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied and *in addition:* [one of the three subdivisions of Rule 23(b) is applicable]. (emphasis added).

Thus, the Rule does not contemplate District Court inquiry into whether a case is maintainable under Rule 23(b)(2) until the Plaintiff has affirmatively established that all of the prerequisites of Rule 23(a) have been met.

It is also clear from the legislative history of the 1972 amendments to Title VII that Congress intended that the requisites of Rule 23 continue to apply to actions brought under Title VII. The House of Representatives' bill included a provision prohibiting the use of class actions in Title VII suits. The Joint Conference Committee rejected that provision and stated:

> In establishing the enforcement provisions under this subsection and in Subsection 706(f) gener-

> ally, it is not intended that any of the provisions contained therein are designed to effect the present use of class action lawsuits under Title VII *in conjunction with Rule 23 of the Federal Rules of Civil Procedure* (emphasis added). *Legislative History of the Equal Employment Opportunity Act of 1972* at 1773.

Thus, the legislative history of the most recent amendments to Title VII specifically rejects the notion that Rule 23 should be liberalized or ignored in cases brought under it. Judge Godbold pointed out in his specially concurring opinion in *Johnson* v. *Georgia Highway Express,* 417 F.2d 1122 (5th Cir. 1969) that an overly liberal interpretation of Rule 23 in Title VII cases not only places an unfair burden upon the defendant who must defend challenges to a variety of practices at distinct geographical locations, but also prejudices the rights of individual class members who would be bound by the *res judicata* effect if the Plaintiff failed to prove his case. *Id.* at 1125-27. *See generally,* Note, *Collateral Attack on the Binding Effect of Class Action Judgment,* 87 Harv. L. Rev. 589 (1974).

As the Court said in *Schlagenhauf* v. *Holder,* 379 U.S. 104 (1964):

> The Federal Rules of Civil Procedure should be liberally construed, but they should not be expanded by disregarding plainly expressed limitations. *Id.* at 121.

The decision by the Court of Appeals to adjudicate the question of liability to the Plaintiff class resulted in the *de facto* certification of an inappropriate Plaintiff class. Even assuming *arguendo* that all Title VII actions are class actions, the Court of Appeals preemptory class certification of Plaintiffs' proposed



class without motion, evidence, or argument implies the additional assumption that whatever class the Plaintiffs designate is an appropriate one. ETMF was denied an opportunity to challenge not only the propriety of a plaintiff class but also the *proper scope* of the plaintiff class in this litigation.

The Court of Appeals found the following class appropriate:

> All of East Texas Motor Freight's Mexican-American and black city drivers included in the collective bargaining agreement entered into between ETMF and the Southern Conference of Teamsters covering the State of Texas. (App. 83)

There are several factors which, had they been presented to a District Court properly exercising its discretion within the guidelines of Rule 23, would have required the narrowing of this class.

Each terminal within East Texas Motor Freight's system is an independent profit center. As such, the primary decision concerning hiring of employees is made at the terminal. (App. 103) Therefore, it is entirely possible that employment policies at one East Texas Motor Freight terminal might be discriminatory while those at another East Texas Motor Freight terminal are not. In this case, Plaintiffs were employed at the San Antonio terminal and there was no showing that their claims were typical of those of city drivers employed at other terminals. Therefore, the class would properly be limited to the San Antonio terminal. *See* Fed. R. Civ. P. 23(a)(3); *Sebastian* v. *J. C. Penney Co.,* — F. Supp. —, 12 F.E.P. Cases 1319 (E.D. Cal. 1975); *Jones* v. *United Gas Improvement Corp.,* — F. Supp. —, 12 F.E.P. Cases 344 (D.C. Pa. 1975).

Additionally, the factual determinations necessary to find that a city driver at a road domicile terminal had been discriminated against by virtue of East Texas Motor Freight's no-transfer rules differ significantly from those necessary to show discrimination against city drivers, such as the named Plaintiffs in this case, who are employed at terminals where road drivers are not employed. Thus, a District Court might properly exclude from the class city drivers at road domiciles because the interest of those drivers was asserted in the case filed against ETMF by the Justice Department in the Northern District of Texas on June 2, 1972, under Section 707 of Title VII. 42 U.S.C. 2000e-6. *Cf. Rodgers* v. *United States Steel Corp.*, 508 F.2d 152, 160 (3d Cir. 1975) (It is not an abuse of discretion for District Court Judge to postpone 23(c)(1) hearing until effects of consent decree potentially affecting members of alleged class can be determined).

More importantly, however, assuming *arguendo* that all of ETMF's city drivers had been discriminated against by the two "no-transfer" rules, city drivers at road terminals may well have a superior claim upon the available positions in the road driver category and, thus, the named Plaintiffs would be in competition with and therefore would not be in a position to adequately protect the interest of city drivers at road terminals. Although the Court of Appeals dismissed the contention that Plaintiffs may not fully represent the interests of those members of Local 657 who opposed the merger of seniority lines (App. 79-80), the Appellant Court, consistent with its entire approach to this case, ignored the real distinctions between the interests of city drivers at road terminals and those



of the named Plaintiffs. Where such a potential conflict exists, a District Court considering the mandate of Rule 23(a)(4) that the named Plaintiffs should fairly and adequately represent the class, must seriously consider severing city drivers at road terminals from the Plaintiff class. As the Court of Appeals said in *Philips* v. *Klassen*, 502 F.2d 362 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1975):

> Class members whose interests are antagonistic in fact to, or even "potentially conflicting" with, the interests of the ostensibly representative parties cannot be bound, consistent with the requirements of due process to an adjudication taken in their name. *Hansberry* v. *Lee*, [311 U.S. 32 (1940)]. Where courts discern that the interests of the named plaintiff are in significant part antagonistic to those of the class he purports to represent, they decline to entertain the action as a class action. *Id.* 366 (footnote omitted).

Finally, the theory of liability adopted by the Court of Appeals is premised on several critical assumptions relating to the aspirations and expectations of city drivers at the time they were initially hired. Were they frustrated road applicants who were shunted into the city driver classification, or were they simply applicants seeking whatever employment was available at the ETMF facility located near their residences? The resolution of this question will vary based on whether the city employee is employed at a road domicile terminal, the road driver hiring patterns at that terminal, and if no road drivers are employed at the terminal, its distance from the nearest road domicile terminal. The individual circumstances of the 21 ETMF terminal facilities in Texas are sufficiently distinct vis-a-vis claims of resident

city drivers that it would not have been an abuse of discretion for the trial court to have limited the Plaintiff class to the San Antonio terminal. However, the Court of Appeals deprived the Defendant of an opportunity to present that complex issue to the District Court, and in fact certified an inclusive Plaintiff class without considering or soliciting argument on the appropriate scope of the Plaintiff class.

The procedural history of this litigation exemplifies the dangers of shifting the class certification responsibilities from the District Court to the Court of Appeals. The District Court's determination dismissing the class action was supported by the evidence, was not clearly erroneous and should have been affirmed by the Court of Appeals. At the very least, the Court of Appeals should have vacated the case with instruction to the District Court to make the appropriate findings pursuant to Rule 23(c)(1) and, if it found that a class action was appropriate, to define the class and conduct a new trial. By determining the appropriateness of the class and liability to the class as it did, the Court of Appeals deprived the Defendants of due process of law.

For the foregoing reasons, it is ETMF's position that the trial court correctly dismissed the class action and the Court of Appeals was incorrect when it concluded that the District Court's finding that the Plaintiffs had abandoned the Plaintiff class was clearly erroneous. The Court of Appeals compounded its error when it *sua sponte* certified the litigation as a class action notwithstanding the Plaintiffs' and the District Court's failure to seek and make a Rule 23 determination as to the propriety of the Plaintiff class.



## II. THE COURT OF APPEALS ERRED IN HOLDING THAT THE MERE INTRODUCTION OF UNDIFFERENTIATED EMPLOYMENT DATA, CONSTITUTED A PRIMA FACIE CASE OF DISCRIMINATION AGAINST THE CLASS.

### A. The Court's Decisions in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Griggs v. Duke Power Co., 401 U.S. 424 (1971) Require that the Plaintiff in a Title VII Action Show More than a General Imbalance in the Defendant's Workforce.

The preceding portion of this brief sets forth an analysis of the deficiencies in the Court of Appeals decision to *sua sponte* certify this litigation as a class action. The root of the appellate court's error is that the parties did not try the matter as a class action. Thus, there is no factual record upon which to base a class action determination. The Court of Appeals' mistaken perception of the litigation as it actually occurred also flawed its ruling that ETMF was liable to the Plaintiff class. Contrary to its opinion, the Court of Appeals did not reverse a decision by the District Court because the latter court dismissed the class claims and, therefore did not make a finding on the merits. Rather, the Court of Appeals assumed the role of District Court and tried the matter in the first instance with respect to the Plaintiff class and entered a finding of liability against ETMF.

The Court of Appeals justified this novel appellate exercise by the conclusory statement it had "before [it] a record of the proceedings, completed as a class action, . . ." (App. 81). Based upon the incorrect assumption that the litigation was actually tried as a class action, the Court of Appeals held that the District Court's implied finding that ETMF did not discriminate against the Plaintiff class was clearly erroneous. (App. 97). In its opinion the Court of Appeals certified a Plaintiff class; reviewed a trial

record which, by stipulation, was limited to the individual claims of the named Plaintiffs; and reversed an "implied" finding by the District Court that ETMF was not liable to the Plaintiff class. The Court of Appeals thus reversed a trial court finding that had never been made with respect to a Plaintiff class that had not been before the District Court. For this reason, it is ETMF's position that the Court of Appeals' finding of liability with respect to the Plaintiff class was improvident.

Prescinding from the manner in which the Court of Appeals' finding of class liability was made, it is ETMF's position that the standards applied by the Court of Appeals to support its substantive finding of class liability were erroneous.

It is axiomatic that a Plaintiff in a Title VII suit, whether an individual action or a class action, has the burden of proof in a case involving employment discrimination. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973); *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975). Title VII protects persons from employment practices which affect them adversely "*because* of [their] race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2 (emphasis added). Title VII most emphatically does not protect members of minority groups from any and all adversity in their employment, but only from that adversity which would not have occurred but for their race, color, religion, sex or national origin. *McDonald* v. *Santa Fe Transportation Co.*, —— U.S. ——, 44 U.S.L.W. 5067, (U.S. June 25, 1976) at n.10. Thus, a Plaintiff to satisfy the burden of proof in a class action under Title VII must do more than show that the class members are protected under Title VII and have been affected adversely in their employment; the Plaintiff must also show that a particular adverse occurrence would not have taken place had the plaintiff class not been members of a protected group.



The Court has held that a certain quantum of evidence will raise a sufficiently strong inference of discrimination to create a *prima facie* case and to justify shifting the burden of proceeding to the defendant to show facts which establish a nondiscriminatory explanation for the Plaintiffs' allegations. *McDonnell Douglas Corp.* v. *Green, supra,* at 802. The quantum of evidence necessary to shift the burden will vary with the litigation, but the idea of a *prima facie* case has been adopted as a central part of our jurisprudence in civil rights litigation. If Defendant responds to the *prima facie* case with evidence sufficient to sustain a contrary inference, the burden again shifts to the plaintiff to show that Defendant's explanation is merely a pretext. *Id.* at 804. It is ETMF's position that the Court of Appeals' method of implementation of this general approach to the submission of proof was erroneous. The facts relied upon were facially inadequate to, consistent with due process, establish a *prima facie* case and thereby shift the burden of proceeding to ETMF.

The adverse employment situation from which the Plaintiffs seek relief is that they would like to be over-the-road drivers for East Texas Motor Freight and claim that they are prevented from becoming road drivers by ETMF's no-transfer rules and by the maintenance of separate lines of seniority.

The Court of Appeals conceded in its opinion, that ETMF's no transfer rules and seniority provisions were not inherently discriminatory, and said:

> "Typically, city drivers are not permitted to transfer to line driver jobs. Where they are, they

are not generally permitted to carry over seniority for job bidding and lay off purposes. The result is, at the very least, a strong disincentive for city drivers to transfer to the road. City drivers are thus effectively 'locked in' their city driving jobs with no realistic possibility of transferring to line driving positions. *Were there no more to the scenario, of course, the federal courts would likely have no concern; there is nothing per se illegal in no-transfer or separate seniority policies."* (App. 84) (emphasis added).

In order to prove a *prima facie* case of violation of Title VII, the plaintiffs must show initially that the neutral policy has a disproportionate impact on them because of their race or national origin. *Albermarle Paper Co.* v. *Moody, supra,* at 425.[10] Plaintiffs' theory of disproportionate impact is based on the factual

[10] In entering its finding of liability in favor of the Plaintiff class, the Court of Appeals focused on the employer's policies relating to transfer between classifications and ignored ETMF's facially neutral and uniformly applied rule restricting transfer between terminals. This policy, based on the employer's profit-center method of doing business would by its operation preclude the majority of the plaintiff class (city drivers employed at non-road domiciles) from consideration as road drivers and, if lawful, would function as a defense to liability. The Court of Appeals' necessarily implied finding that this policy was unlawful is unsupported by the record and by applicable precedent. In order to find that ETMF's facially neutral "no transfer between terminals" policy was discriminatory, the Plaintiffs would have had to prove that the policy perpetuated the consequences of past discrimination. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). In this instance, the Plaintiffs would have to prove that because of past discrimination, minority drivers were hired in city-driver-only terminals in disproportionate numbers. There is no evidence in the record to support such an assertion. Further, this question was not an issue in this litigation until it was implicitly decided by the Court of Appeals *sua sponte* as a premise to its finding of class liability.



premise that they were, at the time of hire, unlawfully refused employment as road drivers because of their race or national origin and that the personnel policies inhibiting post-employment transfer necessarily had a disproportionately adverse impact on them because they perpetuated the earlier unlawful hiring procedures. Therefore, as the Court of Appeals recognized, proof of past discrimination in hiring involving the Plaintiffs and their class is essential to the Plaintiffs' *prima facie* case. (App. 85). Without such proof, the Plaintiffs have established no nexus between their race or national origin and the employment situation that they are challenging in this litigation and no member of the class would be entitled to recover. *See, Franks* v. *Bowman Transportation Co., supra.* Therefore, the *prima facie* case determination turns on whether the Plaintiffs introduced sufficient evidence to show that the members of the plaintiff class were victims of discriminatory hiring policies.

The Court of Appeals held that "a *prima facie* case of discrimination may be established by statistical evidence and statitstical evidence alone." (App. 86). This aphorism is misleading in its simplicity because it is often mistakenly perceived as a universal rather than as a generalization.[11] The degrees of sophistication

[11] *See, e.g., Kaplan* v. *Theatrical and Stage Employees,* 525 F.2d 1354, 1358 (10th Cir. 1975); *U.S.* v. *TIME-D. C., Inc.,* 517 F.2d 299 (5th Cir. 1975), *cert. granted,* 44 U.S.L.W. 3669 (U.S. May 25, 1976); *Sabala* v. *Western Gillette,* 516 F.2d 1251, 1261 (5th Cir. 1975); *Pettway* v. *American Cast Iron Pipe Co.,* 494 F.2d 211, 225 n. 34 (5th Cir. 1974); *Reed* v. *Arlington Hotel Co.,* 476 F.2d 721, 723 (8th Cir.), *cert. denied,* 414 U.S. 854 (1973); *Parham* v. *Southwestern Bell Telephone Co.,* 433 F.2d 421, 426 (8th Cir. 1970).

with which statistics are submitted and the circumstantial context in which they appear in Title VII cases vary to such a degree on a case-by-case basis, that there is no uniformity in the point at which statistics establish a *prima facie* case and the burden shifts. When, however, the Court is careless in its analysis of the statistics and their context, the generalization runs rampant and legal theory supersedes reality.

In this case the following constitutes the totality of the Court of Appeals analysis of the Plaintiffs' evidence of past hiring discrimination:

> The statistics in the instant case are overpowering. East Texas Motor Freight has stipulated that prior to the date that Rodriguez filed a charge of discrimination with the EEOC in 1970, ETMF had never employed a Negro or Mexican-American as a line driver in that portion of the State of Texas covered by the Southern Conference Area Supplemental Agreement. (App. 86).

The Appellate Court's opinion points to no evidence in the record explaining why it considered this statistic to be "overpowering."[12] The opinion merely states that the statistics were so similar to those in other cases, where a *prima facie* case of past discrimination had been found, that these statistics, too, must con-

[12] Relying on its decision in this case, the Court of Appeals later rejected the attempts by defendants to point out the weaknesses in its statistical approach *United States* v. *TIME-D. C., Inc.*, 517 F.2d 299, 314-15 (5th Cir. 1975), *cert. granted*, 44 U.S.L.W. 3669 (U.S. May 25, 1976). Borrowing the Court's own colorful phrase, the Court of Appeals for the Fifth Circuit has in this and later cases achieved the apotheosis of the "inexorable zero." *See Id.* at 315 and cases cited therein.



stitute a *prima facie* case. (App. 86). Even assuming the probity of the statistical evidence introduced in the cases relied upon by the Court of Appeals, the congruency of the factual background in those cases to the instant proceeding was not discussed and, in fact, does not exist. The fact that each of the cases relied upon by the Court of Appeals involved a trucking company's hiring practices at terminals which employed both city and road drivers significantly distinguishes them from this case and requires further analysis. In the present case the Plaintiffs purport to represent all ETMF's city drivers in the state of Texas, the majority of whom are not employed at road domicile terminals. To have become road drivers with East Texas Motor Freight at the time of initial employment, they would have had to apply at a geographically separate company terminal from the one at which they had actually applied and were ultimately employed. (App. 187). The carrier's local hire policy is uniformly applied to all similarly situated applicants whether minority or non-minority and is consistent with its profit center method of operation. (App. 187). The Court of Appeals found "terminal based responsibility for hiring, and of domiciling road drivers only at certain terminals is not discriminatory." (App. 103). With regard to city drivers employed at the San Antonio terminal, for example, the Plaintiffs must show that statistics introduced compel the conclusion that but for ETMF's past discriminatory hiring policies, they would, as a class, have applied and been employed as road drivers at an ETMF road domicile the nearest of which was approximately 240 miles away. The statistics regarding the racial

profile at road driver domiciles that were relied upon by the Court of Appeals are irrelevant to resolving this question.

Statistical evidence is simply an evidentiary tool, the value of which results from the difficulty of producing direct evidence of discrimination. As such, statistics should be used with care because they are by definition circumstantial [13] proof of discrimination. The inference to which they give rise must be measured to determine whether it includes within its logical

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[13] The assumption implicit in these cases is that absent discrimination, the racial profile of the defendant's workforce would mirror that of the surrounding geographical area or would contain a random distribution of women and minority employees at all levels. As one commentator has observed concerning such an assumption:

> Absent discrimination, of course, one would expect nothing of the sort. Economists labor market analysts, and sociologists have devoted endless energy to trying to determine the various elements that contribute to the distribution of jobs of minority groups. Some of the relevant factors are: Level of education, quality of education, type of education, location by region, by city, by part of metropolitan area, character of labor market at time of entry into the region or city, and many others. These are factors one can in part quantify. Others—such as taste or, if you will, culture—are much more difficult to quantify. Discrimination is equally difficult to quantify. To reduce all differences in labor force distribution (even for entry-level jobs) to *discrimination* is an incredible simplification. N. Glazer, *Affirmative Discrimination: Ethnic Inequality and Public Policy*, 63 (1975).

*See also James* v. *Wallace*, — F.2d —, 12 CCH EPD ¶ 11001 (5th Cir. 1976).

There is always the possibility that even a truly neutral selection process will result in a homogeneous workforce. This possibility increases as the number of available qualified minority persons in the geographical area in which the employer could reasonably be expected to recruit decreases.



limits the Plaintiffs' claims. *See, Robinson* v. *City of Dallas*, 514 F.2d 127 (5th Cir. 1975); *Coopersmith* v. *Roudebush*, 517 F.2d 818 (D.C. Cir. 1975); *Timken Corp.* v. *Vaughn*, — F. Supp. —, 12 F.E.P. 1140 (N.D. Ohio 1976).[14] Therefore, if a Plaintiff in a class action elects to rely on statistical evidence to establish a *prima facie* case of hiring discrimination against members of a class, he must show that members of that class were affected by the discrimination—that is, they were available, qualified, and present in a geographical area from which the Defendant could reasonably have been expected to recruit.

At the time they were hired by ETMF the Plaintiffs were residents of San Antonio and applied and were employed as city drivers in San Antonio. Pursuant to the carriers' policy of local hiring, applicants coming to the San Antonio terminal were considered only for vacancies at that facility. The only driving jobs available at the San Antonio terminal were in the city driver classification; the nearest company facility at which road drivers were employed was approximately 240 miles from San Antonio. There was neither evidentiary proof nor the factual basis for an intuitive inference that at the time they were hired, the plaintiffs or plaintiff class members had any interest in employ-

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[14] The logical illusions that may be drawn from statistics were illustrated by the District Court in *Lewis* v. *Pennsylvania Industrial Development*, 371 F. Supp. 877 (E.D. Pa. 1974):

> [I]t is statistically true that there have been no forest fires on Manhattan Island since the 'Smokey the Bear' advertisements have been displayed in New York subways. However, it is not commonly accepted that this statistic proves the value of advertising. *Id.* at 885 n. 14.

ment as road drivers at some distant location in the ETMF system. (App. 284).

Thus, the employment statistics introduced by the Plaintiffs do not raise an inference that ETMF discriminated against the Plaintiffs and the members of the plaintiff class who were hired in San Antonio or at other facilities located outside the labor market of a road domicile terminal. Even assuming *arguendo* that the statistics justified a preliminary inference that ETMF may have discriminated against Blacks and Mexican-Americans in hiring at its road driver domiciles,[15] there is no justification for the inference that ETMF discriminated against class members who were situated like the Plaintiffs in labor markets that have no connection with the local labor market areas from which road drivers were hired.[16]

In this case Plaintiffs presented no evidence to show why they should have been included in the labor market of a terminal 240 miles distant from the place at which they initially sought employment. The Court of Appeals appears to be of the opinion that Plaintiffs

[15] ETMF does not contend that there are no Black or Mexican-American persons qualified to be road drivers in the geographical areas surrounding each of its road terminals. However, a *prima facie* case of discrimination should include proof establishing that they existed in sufficient number to make defendant's failure to employ them highly improbable in the absence of discrimination. This is both a logical and fair requisite.

[16] A labor market is delimited by the geographic scope of the employer's search for job applicants and the area from which applicant/employees would reasonably respond to job possibilities. *See Timken Corp.* v. *Vaughn, supra* at 1144 (N.D. Ohio 1976); *Stamps* v. *Detroit Edison Co.*, 365 F. Supp. 87, 111 (E.D. Mich. 1973), *aff'd in applicable part*, 515 F.2d 301, 313 (6th Cir. 1975), *pet. for cert. filed*, 44 U.S.L.W. 3139 (U.S. Sept. 6, 1975).



and their class should be included in road driver labor markets irrespective of geography, stating simply: "We are not blind to the recognized mobility of today's minorities." (App. 103). The Court supports this novel thesis by citation to a decision which makes only a cursory reference to labor mobility in a dissimilar context. *See Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1361 (5th Cir. 1974).

ETMF believes that it was improper for the Court of Appeals to make a factual finding with respect to a controversial and critical premise in its legal analysis on the basis of judicial notice when neither the parties nor the trial court considered the question in the first instance. *City of Kenosha* v. *Bruno*, 412 U.S. 507, 514 (1973). However, even assuming judicial notice as theoretically acceptable in these circumstances, the 1970 census indicates that of Spanish surnamed or Spanish language persons living in the San Antonio area in 1970, more than half were living in the same house as in 1965 and another third were living in a different house in the same county. Bureau of the Census, *1970 Census: General, Social and Economic Characteristics, Texas*, table 97.

In contrast to the Court of Appeals' finding, reputable labor economists are of the opinion that data concerning the geographical mobility of minority families are too scanty to be conclusive. Parnes, *Research on Labor Mobility* at 117 (Social Science Research Council) (1954). However, minorities may be less likely to be geographically mobile because of the cost involved in moving. *See Id.* at 76-77; Reynolds, *The Structure of the Labor Market*, at 37-38, 41 (1951); Burton and Parker, "Interindustry Variations in Voluntary Labor Mobility," 22 *Industrial and Labor*

*Relations Review,* 199, 207 (1969); Galloway, "Labor Mobility, Resource Allocation and Structural Unemployment," 53 *The American Economic Review,* 694-97 (1963). Thus, at the very least, questions related to the socio-demographic phenomenon of minority labor force mobility or immobility are part of the burden of proof to make a *prima facie* case and are for the District Court to determine in an adversary proceeding.

In addition to the geographic scope of the labor market, the Plaintiffs should be required to establish the skill group from which the employer recruits. If there are a relatively small number of minority persons qualified to perform the job, or if all those qualified are employed elsewhere and not seeking employment, then the employer can hardly be held liable for failure to employ members of the minority group in issue. Failure to require the Plaintiffs to show that there are significant numbers of qualified members of the class in question in the available geographical labor market would be contrary to the Court's analysis of Title VII in *Griggs* v. *Duke Power Co., supra:*

> Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origin. Far from disparaging job qualifications as such, Congress has made such qualifications a controlling factor, so that race, religion, nationality and sex become irrelevant. What Congress has commanded is that any test used must measure the person for the job and not the person in the abstract. *Id.* at 436.

Because the Plaintiffs and their class have failed to show that as a class they were present in the geographic and available labor market from which East Texas Motor Freight could reasonably be expected to recruit,



they have failed to show that the Plaintiff class in this litigation have been victims of past hiring discrimination by ETMF. Having failed to show that essential element of their case, they have failed to establish a *prima facie* case of discrimination.

**B. In Addition to a Showing of Past Discrimination in Hiring, the Plaintiffs Must, as Part of Their Prima Facie Case, Establish That at Least Some Members of the Class Have Been Adversely Affected in Their Employment because of the Challenged Policies.**

Having found that the Plaintiffs had established a *prima facie* case of past discrimination in hiring, the Court of Appeals stated:

> The conclusion is inescapable that both the no-transfer policy and the maintenance of dual seniority rosters, one for city drivers and one for line drivers, have perpetuated ETMF's past discriminatory hiring practices. (App. 90).

The "inescapable" character of the Court of Appeals conclusion depends in part on the qualifications of the Plaintiff class to be road drivers at the time they were hired into the city driver classification and thereafter. There is no evidence in the record that the Plaintiff class as a group was or is so qualified.[17] Nor did the Court of Appeals point to any vacancy in the road category which could have been filled by ETMF city drivers had they not been "locked in" by the challenged practices. Thus, it is entirely possible if the

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[17] The District Court found that the named Plaintiffs themselves were not qualified to be road drivers. (App. A at 64 ¶¶ 23, 24). The Court of Appeals did not dispute this finding but merely required that ETMF consider them for road driver positions as openings occurred.

Court of Appeals decision is allowed to stand, that no member of the class will be entitled to relief. The employer would then be in the anomalous position of being liable to the class, but not liable to any individual class member. This anomaly results from the increasing use of bifurcated trials in Title VII class actions.

The burden of proof in Title VII class actions was first characterized as "a bifurcated burden of proof problem" by the Fifth Circuit in *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 437, 443 (1974):

> Initially, it is incumbent on the *class* to establish that *an employer's employment practices have resulted in cognizable deprivations to it as a class.* At that juncture of the litigation, it is unnecessarily complicating and cumbersome to compel any particular discriminatee to prove class coverage by showing personal monetary loss. *What is necessary to establish liability is evidence that the class of black employees suffered from the policies and practices of the particular employer.* Assuming that the class does establish invidious treatment, the court should then properly proceed to resolve whether a particular employee is in fact a member of the covered class, has suffered financial loss, and thus is entitled to backpay or other appropriate relief. *Id.* at 443-44 (emphasis added).

The Fifth Circuit provided further insight into the bifurcated trial procedure in *Sagers* v. *Yellow Freight System, Inc.*, 529 F.2d 721 (1976):

> Title VII litigation is frequently conducted through a bifurcated proceeding. During the first stage, *general liability for discrimination against the class may be adjudicated*; if such liability is found, a second proceeding is held during which the specific relief due individual class members is determined and awarded. *Id.*, at 733 (emphasis added).



Until the Court of Appeals' decision in *Rodriguez,* the liability portion of the litigation required proof by the Plaintiff of discrimination "against the plaintiff class". The Court of Appeals has dispensed with the first stage requirement of discrimination against the Plaintiff class and has held that liability can be based on the mere finding that a Defendant employer discriminates. The Court of Appeals' approach results in a finding of "discrimination in the air" at the first stage of proceedings without any expectation that if the trial court and the parties go to the expense and effort of the second stage of the litigation that any class member will recover.

ETMF does not dispute the efficiency of the traditional bifurcated procedure in Title VII class actions which the Court impliedly approved in *Franks* v. *Bowman Transportation Co., supra,* 47 L. Ed. 2d at 466. In *Franks* the Court rejected the notion that at the liability stage of the proceedings, the Plaintiff must prove "vacancy, qualification and performance" for every individual member of the class. *Id.* at 466. It should be viewed as inconsistent to the purpose underlying Federal Rule 23 to require every class member to establish the fact and extent of their damage as a result of the challenged practice. However, the deferral of individual claims of discrimination does not justify eliminating from the litigation the requirement that the Plaintiff allege and present proof that the employer discriminated against him and his class. It is a fundamental principle of law that a Plaintiff must demonstrate injury to himself and to his class in order to state a cause of action. This principle is founded on Article III, Section 2 of the Constitution which restricts judicial power to "cases"

and "controversies". *Flast* v. *Cohen,* 292 U.S. 83, 94-101 (1968); *Weiner* v. *Bank of King of Prussia,* 358 F. Supp. 684 (E.D. Pa. 1973). The Court of Appeals, by permitting a finding of liability on the basis of an evidentiary record that does not include proof of injury to the Plaintiff and to the Plaintiff class, allows the Plaintiff to challenge employment practices in the abstract. The absence of a requirement that Plaintiff prove impact eliminates the assurance that there is a case or controversy and that the Plaintiffs and their class have the requisite adverseness to meet the "standing" corollary to the case of controversy principle. *Sierra Club* v. *Morton*, 405 U.S. 727, 738 (1972). The useful procedural tool of bifurcation cannot be permitted to transform the liability stage of Title VII litigation from a judicial trial to an administrative proceeding. The Plaintiff in a class action under Title VII must be required to establish as part of his *prima facie* case that the Plaintiff class has been injured by the Defendant's unlawful action.

The *Rodriguez* decision creates an imbalance between the policy that prompted the bifurcated procedure and the rights of the defendant to procedural fairness. In the second stage of a bifurcated proceeding, the burden shifts to the Defendant to prove that the individual claimant is not entitled to benefit from the remedial order. *Franks* v. *Bowman, supra,* at 466. If the element of injury enters only at this later stage, the Defendant, in order to avoid a monetary judgment, must prove a negative—that no qualified member of the class was interested in the job in question. Nothing in Title VII warrants such an unfair and drastic departure from our traditional allocation of the burden of proof in civil litigation.



The Court of Appeals for the Tenth Circuit recently recognized that a *prima facie* case necessarily includes proof that members of the class have actually been harmed by the challenged practice. *Rich* v. *Martin Marietta Corp.,* 522 F.2d 333 (10th Cir. 1975). In that case, the Court of Appeals said:

> [T]he plaintiff's evidence . . . adduced, including statistics *and general qualifications,* determine[s] whether the plaintiffs have proven a *prima facie* case. Only after that should the court hear the defendant's evidence as to nonqualification, nondiscrimination or business necessity. . . .
>
> Considered in this light, the court's findings that the plaintiff failed to make out a *prima facie* case become highly questionable. *The particular plaintiffs had long experience and were in a position in each and every instance to be considered for promotion,* so when they have shown their lengthy tenure and the extent and scope of their knowledge and experience, it would appear that they have established that they were qualified.
>
> . . . Once a plaintiff has shown that he is qualified, he need only show a discriminatory impact and that he was among the class of employees who could have been considered for promotion. Defendant may, of course, rebut this *prima facie* showing by producing evidence of objective business reasons or necessity for its failure to promote the plaintiffs. Plaintiffs, in turn, are free to show that this was pretextual. *Id.* at 347-48 (emphasis added.)

Similarly, in *Love* v. *Pullman Co.,* 12 F.E.P. Cases 332 (D.C. Colo. 1976), the District Court stated:

> . . . a bifurcated trial procedure . . ., the issue of liability to be tried first. If the outcome were to establish liability, or the *"fact of damage,"* then

> a subsequent proceeding, absent a settlement, would be required to determine the validity and amount of individual claims. *Id.* at 334 (emphasis added.)

The District Court defined the elements of a *prima facie* case in a class action to include:

> (1) members of the class were qualified for the desired positions; (2) there was a discriminatory impact on the class; and (3) they were among the class of employees who could have been considered for promotion [or hire] but for discriminatory policies. *Id.* at 339.

The courts in *Rich* and *Love, supra,* both implicitly required a showing that there are members of the class entitled to relief as an element of a *prima facie* case of liability under Title VII. *Cf. Griggs* v. *Duke Power Co.,* 401 U.S. 424, 430 (1970). As the Court of Appeals stated in *Harper* v. *Trans World Airlines,* 525 F.2d 409 (8th Cir. 1975):

> In order to successfully maintain a Title VII action, the plaintiff must initially prove that the practices of the employer have a discriminatory effect. While the employer is not necessarily vindicated merely because he lacks the intent to discriminate he will be *absolved* if *the plaintiff fails to prove a discriminatory effect upon a protected class.* If the discrimination is not shown, the judicial inquiry ends. *Id.* at 411 (citations omitted, emphasis added).

Without a showing of harm, there is no proof of discriminatory effect. In this case, the Court of Appeals entered a finding of liability in favor of the plaintiff class on the basis of a record devoid of discriminatory effect and pursuant to a legal analysis



that had no place for that critical factor in the calculus of liability. Unless the Court corrects this error and requires the plaintiffs to show that the Plaintiff class has been damaged by the challenged employment practice, the trial court would be imposing liability merely because a practice has the potential of being discriminatory. Congress did not intend the courts to function as administrative agencies in the enforcement of Title VII. Their proper role, under Section 706, is to decide claims of discriminatory activity. A Title VII trial must be directed toward that objective, and the class must be required to prove that they were the victims as part of their *prima facie* case of discrimination.

## III. THE DISTRICT COURT'S FINDING THAT ETMF DID NOT DISCRIMINATE AGAINST THE NAMED PLAINTIFFS IS NOT CLEARLY ERRONEOUS BUT IS SUPPORTED BY THE STIPULATIONS OF THE PARTIES AND EVIDENCE IN THE RECORD AND, THEREFORE, SHOULD BE REINSTATED.

Whether or not the District Court correctly dismissed the class action aspects case, the liability of the Defendants to the named Plaintiffs was a separate issue to be decided independently of the question of liability to the class. The Courts of Appeals, including the Fifth Circuit, have held that in a Title VII class action, a court may find that a Defendant has discriminated against the class even though the named Plaintiff has failed to show that he was a victim of that discrimination. *E.g., Barnett* v. *W.T. Grant Co.,* 518 F.2d 543, 547-48 (4th Cir. 1975); *Baxter* v. *Savannah Sugar Refining Corp.,* 495 F.2d 437, 443-44 (5th Cir.), *cert. denied,* 419 U.S. 1033 (1974); *Roberts* v. *Union Co.,* 487 F.2d 387, 389 (6th Cir. 1973); *Martin* v. *Thompson Tractor Co.,* 486 F.2d 510, 512 (5th Cir. 1973).

Therefore, the findings of the District Court that the named Plaintiffs in this case were not qualified to be ETMF road drivers and that ETMF's failure to consider their qualification was not discriminatory must be reinstated unless they were "clearly erroneous." Fed. R. Civ. P. 52(a); *United States* v. *National Association of Real Estate Boards,* 339 U.S. 485, 494 (1950); *United States* v. *Yellow Cab Co.,* 338 U.S. 338, 342 (1949). The Court of Appeals pointed to no evidentiary basis for its conclusion that the District Court's findings concerning the individual claims of the named Plaintiffs were clearly erroneous. Indeed, it could not do so because those findings reflect a correct application of the law and are well supported by the evidence in the record.[18]

The Plaintiffs in this case stipulated that their individual claims of discrimination were based upon the

[18] The trial court made detailed findings of fact which included the following:

> 23. None of the plaintiff employees could satisfy all of the qualifications for a road driver position according to the company manual due to *age* or *weight* or *driving record.* The qualifications apply universally to all job applicants and employees and are not in any manner racially discriminatory.
>
> 24. The driving, work, and/or physical records of the plaintiffs are of such nature that only casual consideration need be given to determine that the plaintiffs cannot qualify to become road drivers. The failure of the defendant truck line to proceed with a detailed, comprehensive consideration of the plaintiffs' applications was for valid business reasons and not because of any discrimination against any of the plaintiffs because of their race or national origin.
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> • • • • • • • • • •
>
> 28. The defendant truck line did not prevent or discourage the plaintiff employees from seeking or securing a road job transfer nor from making written application for said position because of their race or because they filed a complaint with the Equal Employment Opportunity Commission, or for any other reason. (App. 64-65).



legal theory that after their original lawful employment, they had been "locked in" to the lower paying job of city driver. They further stipulated that the only issue before the court was whether or not failure to consider Plaintiff's road driver application constituted a violation of Title VII. (App. 113, 115 ¶ 8.) In order to prevail under this theory, the Plaintiffs must show that they were discriminated against by ETMF in their initial hire. Otherwise, the no-transfer rules, although they admittedly have the effect of locking the Plaintiffs into their city driver jobs, do not perpetuate the consequences of past discrimination. Absent past discrimination in hiring, these rules are neutral in effect as well as being facially neutral and, therefore, do not violate Title VII. *See Griggs* v. *Duke Power Co., supra.*

Here, the Plaintiffs stipulated that they had not been discriminated against in their initial hire at the San Antonio terminal. (App. 113, ¶ 1). This stipulation, like the stipulation of the issues, *supra,* is absolutely binding. Even in criminal cases courts have recognized the binding effect of stipulations whether they operate against the prosecution or the Defendant. *H. Hackfeld & Co.* v. *United States,* 197 U.S. 442, 447 (1905);[19] *United States* v. *Harding,* 507 F.2d 294, 298 (10th Cir. 1974); *Osborne* v. *United States,* 351 F.2d 111, 120 (8th Cir. 1965) (supplemental opinion on rehearing). Such stipulations are encouraged by Rule 16 of the Federal Rules of Civil Procedure and are

[19] In *Hackfeld,* the parties stipulated to the ultimate fact in controversy—that the escape of immigrants could not have been reasonably anticipated by and did not occur by reason of any negligence on the part of the defendant. The Court construed the criminal statute in question to require a finding of negligence and, therefore, the petitioner's conviction was reversed.

uniformly held to be binding unless the party seeking to be relieved from them can show they were obtained by fraud, duress, or misrepresentation. *Farmers Co-Operative Elevator Association* v. *Strand,* 382 F.2d 224, 231 (8th Cir. 1967), *cert. denied,* 389 U.S. 1014, *reh. den.,* 390 U.S. 913 (1968); *Osborne* v. *United States, supra,* at 120.

As the Fifth Circuit itself recognized in *Laird* v. *Air Carrier Engine Service,* 263 F.2d 948 (5th Cir. 1959):

> Those statements or agreements which dispense with proof of fact are made with respect to the impending trial and, until withdrawn, are not merely evidence as in the case of an ordinary admission. They are absolutely binding. As long as they stand, they foreclose the matter all together . . . Any other rule would largely destroy the utility of pretrial. *Id.* at 953-54.

*Accord, Risher* v. *United States,* 465 F.2d 1, 5 (5th Cir. 1972).

Because they were not discriminated against by ETMF's hiring practices at the San Antonio terminal, the named Plaintiffs would have to show that they were forced into applying for employment as city drivers at the San Antonio terminal because of discriminatory hiring policies at geographically distant ETMF road driver terminals.

No evidence was introduced by any of the named Plaintiffs establishing that they had made inquiries at a terminal in which ETMF domiciled road drivers, that they had made application there, or that they were aware that ETMF allegedly discriminated in



hiring at road driver domicile terminals and, thus, were deterred from applying there. Absent such proof, the Plaintiffs have failed to show that they were prejudiced in their employment because of their race or national origin. Therefore, the District Court correctly concluded that:

> Refusal by the Defendant truck line to permit job transfers without loss of terminal seniority or to maintain separate seniority lists is a reasonable and proper business practice and in accordance with the Union contract and in no manner causes, perpetuates or results in discriminatory practices by any of the Defendants. (App. 64-65, ¶¶ 26-27).

The fact that Plaintiffs are employed at a city-only terminal distinguishes this case from a series of cases relied upon by the Courts of Appeals which have found that the trucking industry's no-transfer rules and separate seniority lines for city and road drivers discriminated against minorities because they have had the effect of locking minorities out of road driver jobs, which they had initially preferred, and still prefer, and which they would have had but for the original discrimination in hiring.[20] In each of those cases, the

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[20] The Court of Appeals relied on the following cases:

*Thornton* v. *East Texas Motor Freight,* 497 F.2d 416 (6th Cir. 1974); *Witherspoon* v. *Mercury Freight Lines, Inc.,* 457 F.2d 496 (5th Cir. 1972); *Hairston* v. *McLean Trucking Co.,* 62 F.R.D. 642 (M.D.N.C. 1974) (later *aff'd* 520 F.2d 226 (4th Cir. 1975); *United States* v. *Navajo Freight Lines, Inc.,* — F. Supp. — (C.D. Cal. 1973) (later *aff'd* in part and *rem'd* in part 525 F.2d 1318 (9 Cir. 1975); *Sabala* v. *Western Gillette Inc.,* 362 F. Supp. 1142 (S.D. Tex. 1973) (later *aff'd* in part and *rev'd & remanded* in part 516 F.2d 1251 (5th Cir. 1975); *United States* v. *Lee Way Motor Freight* 7 CCH

courts found that the Plaintiffs would have preferred to be road drivers when they initially applied for employment at a terminal at which the Defendant employer domiciled road drivers. Because of Defendant's discriminatory hiring policies, they were forced to accept employment as city drivers. In most of those cases, the employer, by the time of trial, had ceased to discriminate against Blacks and Mexican-Americans in hiring into the road category, but those members of the class who were the original victims of discrimination and who still wished to be over-the-road drivers were not benefited by the new nondiscriminatory policy. They were deterred from applying for over-the-road employment with their employers because in some cases, they would have to resign their jobs as city drivers with no assurance that they would be rehired as road drivers. In all cases, they would have had to forfeit their company seniority and go to the bottom of the road seniority list. Even though the same policies were enforced against White-Anglo city drivers wishing to become road drivers, courts have found that these facially neutral policies violate Title VII because they prevent the original victims of discrimination from obtaining those positions they would have had from their date of hire but for their race and, thus, they perpetuate the effects of past discrimination.

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E.P.D. ¶ 9066 (W.D. Okl. 1973); *Sagers* v. *Yellow Freight System*, 388 F. Supp. 507 (D.C. Ga. 1973) (later *aff'd* as modified 529 F.2d 721 (5th Cir. 1976)).

All of these cases involved plaintiffs who made application at terminals at which road drivers were domiciled, but because of defendants discriminatory hiring policies were forced into the city driver classification at that terminal. Research discloses no other cases in which a court has found that city drivers at non-road domiciles were entitled to recovery on the "lock-in" theory.



*Jones* v. *Lee Way Motor Freight*, 431 F.2d 245, 248 (10th Cir. 1970).

Here, the Plaintiffs have failed to prove that they were discriminated against in their original hire; therefore, they have failed to prove an essential element of their case. They are concededly locked into the city driver category by ETMF's policy which prohibits transfer between terminals, but that policy does not perpetuate the consequences of past discrimination. Having failed to prove that but for their race they would have initially been hired as road drivers, they simply failed to prove that they are entitled to recovery under Title VII. *See Franks* v. *Bowman Transportation Co.*, — U.S. —, 47 L. Ed. 2d 444, 466 (1976).

In addition to the foregoing fatal failure of proof, the District Court found that none of the named Plaintiffs met ETMF's qualifications. Proof that the individual Plaintiffs are qualified is likewise essential to their case. In *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), the Court articulated the burden of proof which an individual Plaintiff must meet in order to prove a *prima facie* case under Title VII of the Civil Rights Act as follows:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a *prima facie* case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) *that he applied and was qualified* for a job which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. *Id.* at 802 (emphasis added).

In a footnote, the Court stated:

> [13] The facts necessarily will vary in Title VII cases, and the specification above of the *prima facie* proof required from respondent is not necessarily applicable in every respect to differing factual situations. *Id.*

Relying upon the Court's caveat in footnote 13, the Court of Appeals held that the individual Plaintiffs did not have to meet the requirements of *McDonnell Douglas Corp.* v. *Green, supra,* because:

> First, this is a class action. Equally important, the Supreme Court noted in *McDonnell Douglas* no history of past employment discrimination or any other factor that might have discouraged the Respondent from applying for a job. . . . We note also another distinction. In *McDonnell Douglas,* the Respondent's qualifications were undisputed. He had held the job, and apparently satisfactorily, before he was laid off. In the instant case, in contrast, the possibility of meeting one of the most important criteria for hiring—the road test—has been denied to the class of city drivers. (App. 89).

*See also Herrera* v. *Yellow Freight System,* 505 F.2d 66 (5th Cir. 1975).

The fact that this case was characterized as a class action has no impact upon the application of the *McDonnell Douglas* standard to the individual claims. Nor are the other distinctions sufficient to justify disregarding the plain meaning of the Court's decision in *McDonnell Douglas* that an individual Plaintiff in a Title VII suit must, at a minimum, prove that he is qualified to perform the job that he claims has been unlawfully denied him. The proof of qualification is



a *sine qua non* of a *prima facie* case of employment discrimination. *Griggs* v. *Duke Power Co., supra,* at 436.

Brushing aside the stipulation of the parties to the contrary,[22] the Court of Appeals held that the requirement of three years immediately preceding road driving experience had a disparate impact on Blacks and Mexican-Americans and was therefore discriminatory.

There is no indication from the District Court's opinion that, absent the three-year experience requirement, it would have found the named Plaintiffs qualified. On the contrary, the District Court found that:

> None of the Plaintiffs could satisfy all of the qualifications for a road driver position due to *age, weight or driving record.* The qualifications apply universally to all job applicants and employees and are not *in any manner* racially discriminatory. (App. 64 ¶ 23).

These conclusions were based on detailed findings of fact (App. 60, 61 and 63) which have ample support in the record. (Defendant Exhibits C, F, G, H, K, L, NN, BB, CC, GG, JJ, LL, VV, AA, BB, CC, DD, and HH).

Assuming *arguendo* that Plaintiffs instead of stipulating that the road driver qualifications, including the

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[21] The Plaintiffs had stipulated that ETMF's road driver qualifications were not discriminatory. (App. 113 ¶ 5). The Court of Appeals rejected this stipulation on the stated assumption that an experienced attorney would not have "stipulated away their right to relief on the eve of trial." (App. 97). Whatever counsel's motive for entering into these stipulations, he did so voluntarily with no fraud or misrepresentation on Defendant's part and, therefore, he must be bound by them. *H. Hackfeld & Co.* v. *United States, supra.*

three-year over-the-road experience requirement, were nondiscriminatory, had proven that some requirements had a disparate impact upon Blacks or Mexican-Americans, there was substantial evidence in the record from which the District Court could have determined that they were nevertheless not violative of Title VII.

In *Griggs* v. *Duke Power Co., supra,* the Court stated that:

> The touchstone is business necessity. If an employment practice which operated to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. *Id.* at 431.

Because the test and high school completion requirement at issue in *Griggs* had not been shown to "bear a demonstrable relationship to job performance," it was necessary for the Court to further define the concept of "business need" in this context. Despite the Court of Appeals' disfavor of the experience requirement, there can be no question that a requirement of actual experience in a job bears a demonstrable relationship to performance of that job. Furthermore, the record in this case clearly shows that ETMF's road driver qualifications were instituted in the face of urgent business necessity. (App. 176-180).

Early in the 1950's, ETMF had a serious problem with accidents in its over-the-road operation. Because of ETMF's poor safety record, the ICC Department of Transportation suspended ETMF's authority to haul certain classes of government freight and had also withheld additional route authority sought by ETMF. (App. 164, 179). As a result, ETMF instituted more



stringent qualifications for road drivers than city drivers. (App. 176-178). In order to maintain its high standards for road drivers, the "no-transfer" rule between classifications was imposed. (App. 167). The record plainly shows that after the implementation of these qualifications, ETMF's safety record improved dramatically, far surpassing in each year the available official statistical records showing the average record of trucking industry as a whole. (App. 416).

In light of this showing of job relatedness and business necessity, the burden again shifts "to the complaining party to show that other tests or selection devices without a similar undesirable racial effect would also solve the employer's legitimate interest in 'efficient and trustworthy workmanship.' " *Albermarle Paper Co.* v. *Moody,* 422 U.S. 405, 425 (1975) (citing *McDonnell Douglas* v. *Green, supra* at 802). The Court of Appeals assumed that a three-year city or road driving experience requirement would equally serve ETMF's needs. (App. 102-103) That assumption is not supported by facts in the record. Indeed, the record clearly establishes that the mental and physical demands placed on a road driver differ significantly from those placed upon a city driver. (App. 302-305). Considering the serious threat an unqualified road driver poses, not only to ETMF's business but to the general public as well, the plaintiff in this case must show that other requirements would prove equally as effective. No such showing has been made. ETMF's qualifications, therefore, do not violate Title VII, and plaintiffs' failure to meet these qualifications precludes them from prevailing against ETMF in this litigation.

Like the National Labor Relations Act, nothing in Title VII abrogates an employer's right to select its

own employees. *McDonald* v. *Santa Fe Trail Transportation Co.*, 44 U.S.L.W. 5067, 5070 (U.S. June 25, 1976); *see NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939). The Plaintiffs have not shown that they were disqualified because of their race or national origin. Therefore, ETMF's neutral qualifications which bear a demonstrable relationship to an urgent business need must be allowed to stand, especially when, as here, no effective alternative has been advanced by Plaintiffs.

The opinion of the Court of Appeals analyzed neither the facts as found by the District Court nor the manner in which the District Court applied the law to those facts. As we have shown, proper consideration of these factors compels a finding that the District Court was correct in concluding that ETMF had not discriminated against the named Plaintiffs. Because there was no error in the District Court's application of the law to facts well supported in the record, the decision of the District Court should be reinstated.



## CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed with the instructions to reinstate the order of the District Court, dismissing the action.

Respectfully submitted,

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